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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

03 2008

at 2 o'clock and 10 min. P.M. *AK*
SUE BEITIA, CLERK

FOR THE DISTRICT OF HAWAII

) CR. No. 04-00132 DAE

) DEFENDANT'S SUPPLEMENT

) MEMORANDUM RE: APPLICABILITY

) CERTIFICATE OF SERVICE

) Hearing:

Date: April 28, 2006

Time: 9:30 p.m.

Judge: Hon. J. Michael Seabright

Comes now the Defendant DAVID ELLIOTT, by and through his attorney, John S. Carroll, and hereby

respectfully submits his memorandum regarding applicability of U.S.S.G. §2K2.1(a)(4)(B).

I.

BACKGROUND

The Court has allowed the opportunity to address whether or not U.S.S.G. §2K2.1(a)(4)(B) is applicable given the repeal of U.S.C. §921(a)(30). In addition, the Court suggested that if there is corroboration of the fact that the weapons were not being utilized for criminal purposes but were in fact as represented by Defendant, that they were given as security for money owed to him by an employer, that this corroboration would be considered in mitigation. Attached hereto as Exhibit A is a faxed copy of the Affidavit of Gregory Wolfe. The original will be submitted by separate cover. This affidavit announces that it is clear that there was an eye witness to the transfer of the weapons by Elliot's employer and of the fact that not only Defendant Elliott but also Gregory

Wolfe went to the Kona Police Department to inform them of the facts of this case.

II.

ARGUMENT

If in fact the guidelines were mandatory, it is arguable that given the fact that the law at the time the offense was committed should apply. The guideline should have been construed in conjunction with the existing law. 18 U.S.C. §921(a)(30) was repealed in September 2004. The offense at issue was in process by April 18, 2003. The major issue is whether or not the sentencing guidelines should take into consideration the fact that at the time the offense was committed the firearm involved in the offense fell within the definition as "semi automatic assault weapon" as outlined in 18 U.S.C. §921(a)(30). The real issue then is that in spite of the current holdings by the Second and Tenth Circuits this Honorable Court must consider the unique impact that would occur in sentencing Mr. David Elliott to incarceration.

In as much as the law 18 U.S.C. §921(a)(30) was allowed to sunset, it is clear that the intent of Congress is that this particular weapon is no longer one that falls within the definitions as outlined in §921(a)(30) *Id.*

Secondly, and more importantly the Booker case See Booker, 125 S.Ct. at 790, makes it unassailable that the Courts are no longer mandated follow by the guidelines. The Court, obviously, may use the old requirements as suggested guidelines in assisting the sentencing process. The sentencing statutes and rules do not set out a standard of proof for guideline enhancements. This Court only needs to assess whether the acts, which have been plead guilty to, rise to the level that would require incarceration. In the Booker case the issue of reasonable doubt is raised. There is certainly reasonable doubt with respect to the culpability of Mr. Elliott with respect to both charges of which he has plead guilty. First of all, the amount of marijuana that was found was not enough under Hawaii

State Law to make this punishable by more than a civil penalty. That is to say that the marijuana which he had was unmeasurable in terms of weight. The paraphernalia, is of course another issue.

In addition, there seems to be no doubt that the weapons were in his possession for security purposes. Defendant Elliott clearly did not understand or was knowledgeable of the law governing gun ownership in the State of Hawaii. It is equally clear that these weapons were never involved in any way in Interstate Commerce other than prior to the time that they came into his hands. That is when those weapons may have been involved in Interstate Commerce when Brian Kelley possessed them, but they have only been stored underneath Defendant Elliott's bed for all these years.

For all of the above reasons, we ask that the Court consider the facts in our Presentence Statement; that the Court not impose any jail time upon Defendant Elliott. That the Court view Mr. Elliott as a unique individual and consider all of the evidence which has

been submitted on his behalf and weigh that against the crime to which he plead guilty. In the balance, it would seem that imposing community service on Mr. Elliott will adequately repay his debt to society.

DATED: Honolulu, Hawaii May 5, 2006.



JOHN S. CARROLL

Attorney for Defendant
DAVID ELLIOTT

UNITED STATES v. DAVID ELLIOTT; CR. NO. 04-00132 DAE;
Defendant's Presentence Memorandum

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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| UNITED STATES OF |) | CR. No. 04-00132 DAE |
| AMERICA, |) | |
| |) | |
| Plaintiff, |) | CERTIFICATE OF SERVICE |
| |) | |
| vs. |) | |
| |) | |
| DAVID ELLIOTT, |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was duly served upon the following parties at their last known address by hand delivery on this date:

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UNITED STATES OF AMERICA

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DATED: Honolulu, Hawaii, May 5, 2006.



JOHN S. CARROLL

Attorney for Defendant
DAVID ELLIOTT